

**United States Department of Labor  
Employees' Compensation Appeals Board**

C.F., Appellant	)	
	)	
and	)	
	)	
DEPARTMENT OF VETERANS AFFAIRS,	)	<b>Docket No. 20-1572</b>
HUNTINGTON VA MEDICAL CENTER,	)	<b>Issued: November 10, 2021</b>
Huntington, WV, Employer	)	
	)	
	)	

*Appearances:* *Case Submitted on the Record*  
Daniel M. Goodkin, Esq., for the appellant<sup>1</sup>  
Office of Solicitor, for the Director

**DECISION AND ORDER**

Before:  
JANICE B. ASKIN, Judge  
PATRICIA H. FITZGERALD, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On August 31, 2020 appellant, through counsel, filed a timely appeal from an April 17, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>3</sup>

---

<sup>1</sup> In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on an appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> The Board notes that, following the April 17, 2020 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

## **ISSUE**

The issue is whether appellant has established a recurrence of disability commencing December 29, 2012 causally related to her accepted November 16, 2010 employment injury.

## **FACTUAL HISTORY**

This case has previously been before the Board.<sup>4</sup> The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On November 30, 2010 appellant, then a 39-year-old program specialist, filed a traumatic injury claim (Form CA-1) alleging that on November 16, 2010 she felt pain in her right shoulder, arm, and hand while moving a bookcase. On December 15, 2010 she underwent C6-7 anterior cervical discectomy. Appellant was released to return to work for four hours a day in January 2011, and was released to return to work for eight hours a day without restrictions at the end of September 2011.<sup>5</sup>

On October 25, 2011 OWCP referred appellant together with a statement of accepted facts (SOAF), list of questions, and the medical record for a second opinion evaluation with Dr. Edward Gregory Fisher, a Board-certified orthopedic surgeon, for an opinion on causal relationship between the diagnosed cervical conditions and the accepted November 16, 2010 employment injury, whether the cervical surgery performed on December 15, 2010 was causally related to the work injury and medically necessary, and ongoing disability.

In a November 11, 2011 report, Dr. Fisher, based upon a review of the medical record and physical examination, diagnosed postoperative status anterior cervical discectomy and fusion over C6-7 on the right for a right-sided C6-7 herniated disc with radicular and myopathy signs over the right upper extremity, which he indicated were work related. Based on his review of x-ray interpretations taken in November 2010, Dr. Fisher also diagnosed C5-6 and C6-7 degenerative disc disease and arthritis, which he opined was not causally related to the accepted November 16, 2010 employment injury as the findings were preexisting. He further opined that the cervical surgery performed on December 15, 2010 was medically necessary and causally related to the accepted employment injury.

By decision dated November 16, 2011, OWCP advised appellant that her claim had been accepted for cervical intervertebral disc disorder with radiculopathy and myelopathy and that the cervical surgery performed on November 15, 2010 was approved.

On February 5, 2013 appellant filed a notice of recurrence (Form CA-2a) claiming disability from work commencing December 29, 2012. She asserted that her neck symptoms had worsened on December 11, 2012, with the pain becoming paralyzing and increasing in frequency over the next few weeks.

---

<sup>4</sup> Docket No. 14-0194 (issued June 23, 2014).

<sup>5</sup> In November 2011, appellant accepted a job offer with Department of Homeland Security as a space management specialist and relocated from West Virginia to Washington, DC. She was removed from federal service due to her inability to perform the duties of her job effective June 10, 2014.

By decision dated October 7, 2013, OWCP denied appellant's recurrence claim.

On October 30, 2013 appellant, through counsel, filed an appeal with the Board.

While that appeal was pending, OWCP received a June 12, 2014 report from, Dr. Amy Lynch, a Board-certified physiatrist. She provided examination findings, diagnosed cervical disc disorder with myelopathy, and recommended a functional capacity evaluation (FCE) to determine appellant's work capacity. Dr. Lynch advised that appellant was to remain off work pending results from the requested FCE.

An FCE was performed on July 8, 2014 by a physical therapist for Dr. Lynch. The report revealed that appellant was able to perform a sedentary job for four hours a day. The report noted that appellant exhibited symptom/disability magnification and poor effort, or voluntary submaximal effort, based her passing only 27 out of 49 validity criteria during the FCE. Therefore, the usefulness of the examination for final work duty readiness needed to be taken into consideration when evaluating her work capacity. The report recommended an additional thorough neurological examination to determine the extent of bilateral upper extremity weakness and grip testing inconsistencies found during the testing.

By decision dated June 23, 2014, the Board affirmed OWCP's October 7, 2013 decision denying appellant's recurrence of disability claim.<sup>6</sup>

Following the Board's decision, OWCP received a June 12, 2014 patient status report from Dr. Lynch wherein he related a diagnosis of neck pain, that it was work related, and recommended that appellant be off work for a month and/or until she had a follow-up appointment.

In an April 9, 2015 report, Dr. Thomas D. Hansen, a pain medicine specialist, indicated that appellant was seen for complaints of chronic pain. He summarized appellant's medical history, provided examination findings, and noted that appellant was currently unemployed. Diagnoses included lumbar radiculopathy, cervicalgia, and lower back pain.

In an April 25, 2015 report, Dr. Robert W. Macht, a general surgeon, noted an injury date of November 16, 2010, summarized appellant's medical treatment, provided examination findings, and diagnosed postoperative cervical fusion. He concluded that appellant was totally disabled from work at this time. Dr. Macht opined that appellant sustained a recurrence of disability on December 12, 2012.

On June 23, 2015 appellant, through counsel, requested reconsideration and submitted a June 23, 2015 report from Dr. Macht. Dr. Macht explained that he attributed the recurrence of appellant's disability beginning December 11, 2012 due to sequelae of her accepted C6-7 fusion surgery which was performed to treat her accepted November 16, 2010 employment injury. In support of this conclusion, he referenced two magnetic resonance imaging (MRI) scans dated August 2012 and April 25, 2013. The August 2012 MRI scan indicated a mild C5-6 disc bulge and the April 25, 2013 MRI scan indicated cervical posterior degenerative annular tear, some arthritis, acquired spinal stenosis, and C5-6 spondylosis. Dr. Macht indicated that the findings of the April 25, 2013 MRI scan were a natural progression of the surgical fusion performed on December 15, 2010, which he opined had accelerated her preexisting degenerative conditions. He explained that while the fusion performed did not directly harm adjacent spinal areas, there is a

---

<sup>6</sup> *Supra* note 4.

risk of a more rapid degeneration above or below the fusion as a patient ages due to additional stress on adjacent discs. In addition, Dr. Macht indicated that if the C5-6 degeneration had been attributable to the natural aging process, there would be evidence of significant degenerative changes at other levels of her cervical spine, which he noted was not present.

By decision dated March 1, 2016, OWCP denied modification, finding the medical evidence insufficient to establish her claim for a recurrence of disability commencing December 29, 2012. It further found that the C5-6 and C6-7 degenerative disc disease and arthritis was preexisting and unrelated to the accepted November 16, 2010 employment injury based on November 7, 2011 opinion of Dr. Fisher, an OWCP referral physician.

In a March 21, 2016 report, Dr. Macht advised that it was undisputed that appellant was unable to perform any job requiring prolonged computer use. He compared diagnostic testing taken prior to the December 15, 2010 surgery and the December 15, 2010 operative report, which noted no disc disease at any other levels, with MRI scan taken after the surgery, which report mild C5-6 disc bulge and C5-5 posterior degenerative annular tear, spondylosis and some arthritis. According to Dr. Macht, sometime between August 30, 2012 and April 25, 2013 appellant developed dramatic and significant C5-6 changes as documented by her MRI scan. He indicated that she developed a recurrence of disability on December 29, 2012 due to a spontaneous change in her medical condition based on her medical history, diagnostic test results, and medical probability. According to Dr. Macht appellant did not sustain a new injury or new work factor exposure which would cause a change in her condition or any disability. Thus, Dr. Macht opined, based on medical probability, that appellant's work in her new position as a space management specialist since November 2011 was unrelated to her December 2012 recurrence or disability. As to her electromyography/nerve conduction velocity study (EMG/NCV), he explained this test would not detect any changes due to her myelopathy, but was consistent with her myelopathy symptoms and signs. Additionally, appellant's significant upper extremity conditions are not explained by the diagnosis of possible carpal tunnel syndrome (CTS). He explained the right CTS diagnosis could be a false positive or might be present. Thus, Dr. Macht opined that some, if not all of her upper extremity symptoms would be attributable to her November 2010 employment injury.

In a March 28, 2016 report, Dr. Hansen diagnosed cervicalgia, cervical radiculopathy, lower back pain, lumbar and right and left cervical radiculopathy, analgesic use and lumbar pain with radiculopathy impacting the left lower extremity. Physical examination findings and medical history were detailed. Dr. Hansen reported that appellant was not working due to her cervical condition.

On March 30, 2016 appellant, through counsel, requested reconsideration asserting that the March 21, 2016 report from Dr. Macht addressed the deficiencies noted by OWCP in its prior decision and was sufficient to establish her recurrence claim.

By decision dated June 28, 2016, OWCP denied modification finding that Dr. Macht failed to adequately address how her recurrence of disability beginning December 29, 2012 was causally related to the accepted November 16, 2010 employment injury.

OWCP continued to receive progress reports from Dr. Hansen, which did not specifically address appellant's recurrence claim.

In an August 30, 2016 report, Dr. Macht opined that on December 29, 2012 appellant sustained a worsening of her cervical condition, which was unrelated to her work activities in her new position. He attributed the worsening of her cervical condition to the progression of her underlying disease and the fusion causing pathology above or below the fusion cite. In support of this opinion, Dr. Macht explained that it made pathophysiological sense based on the increased stress on the joints above and below the fusion. He concluded that appellant's December 2010 surgery and resulting sequelae was directly due to the accepted November 16, 2010 employment injury.

On October 27, 2016 appellant, through counsel, requested reconsideration and submitted additional evidence. In an October 24, 2016 report, Dr. Hansen noted appellant's continuing pain complaints and indicated an assessment of cervicalgia, muscle spasm, and cervical myopathy.

By decision dated January 25, 2017, OWCP denied modification finding the medical evidence failed to adequately explain the causal relationship between the claimed recurrence of disability and the accepted November 16, 2010 employment injury.

Dr. Macht, in a January 31, 2017 report, opined that appellant's spinal degeneration above and below the fusion site worsened following the surgery, which was supported by the objective evidence. He opined that the worsening of appellant's spinal degeneration above and below the fusion site caused or contributed to the worsening of her condition. Dr. Macht explained that the medical literature indicated that spinal degeneration above or below a fusion site can occur, which he opined occurred in the current claim. According to him, if the increased spinal degeneration was solely attributable to aging, other levels of the spine would be impacted and not just the level closest to the fusion.

OWCP continued to receive progress reports from Dr. Hansen which did not specifically address appellant's alleged recurrence of disability. It also received a series of progress reports from Pier Osweller, a nurse practitioner, in Dr. Hansen's office.

On April 7, 2017 appellant, through counsel, requested reconsideration.

By decision dated March 7, 2018, OWCP denied modification.

In a March 30, 2018 report, Dr. Maged Hamza, a Board-certified physician in pain medicine and anesthesiology, noted that appellant was seen for neck, right clavicle, and shoulder pain complaints. Appellant's history of injury and examination findings were detailed. Diagnoses included cervical facet syndrome, shoulder/clavicle region joint pain, right side secondary to her cervical disc disorder and myelopathy, and myalgia.

OWCP received progress reports from Karla Stapes, an advanced registered nurse practitioner.

In a report dated June 28, 2018, Dr. George Lederhaas, a Board-certified anesthesiologist, noted that appellant was seen for complaints of bilateral neck pain. Physical examination findings included a right hand tremor, exaggerated right arm drop with Rhomberg and pronator drift test, exaggerated left arm drop with normal biceps strength and no pronator drift, and full bilateral shoulder range of motion.

On March 4, 2019 appellant, through counsel requested reconsideration.

By decision dated September 20, 2019, OWCP denied modification finding the medical opinion evidence failed to discuss intervening injuries and any impact on her disability .

On January 3, 2020 appellant, through counsel, requested reconsideration and submitted an October 15, 2019 report from Dr. Macht in support of her request.

Dr. Macht, in his October 15, 2019 report, attributed the deterioration in appellant's condition to her cervical fusion surgery, which was explained in his January 31, 2017 addendum. Moreover, he related that appellant's employment at her new position at the Department of Homeland Security did not aggravate or contributed to a worsening of her spinal condition. The cause of the deterioration was natural progression of her degenerative disc disease above and below the fusion site, which placed additional stress on the joints above and below the fusion site.

On March 26, 2020 OWCP requested that District Medical Adviser, Dr. Franklin M. Epstein, a Board-certified neurosurgeon, review the case record and SOAF and provide an opinion as to whether appellant's C5-6 cervical condition was consequently related to the employment injury, and whether appellant sustained a recurrence of disability as of December 29, 2012 due to her accepted employment injury.

In a report dated April 7, 2020, Dr. Epstein noted that he had reviewed appellant's medical record and the SOAF. He related that his review of appellant's medical records indicated that appellant had developed adjacent level degeneration (ALD) at the C5-6 level. Dr. Epstein explained that ALD was a well-recognized pathologic phenomenon known to experienced spine surgeons, which was an enhanced and accelerated deterioration that occurred in mobile discs adjacent to a fused spinal segment. The fused spinal segment transmitted amplified compressive and torsional forces to the adjacent mobile discs above and below, which multiplied the customary deterioration that occurred with aging.

By decision dated April 17, 2020, OWCP denied modification finding the evidence of record insufficient to establish appellant's claim for a recurrence of disability commencing December 29, 2012.

### **LEGAL PRECEDENT**

OWCP's implementing regulations define a recurrence of disability as an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition, which resulted from a previous injury or illness without an intervening injury or new exposure to the work environment.<sup>7</sup>

An employee who claims a recurrence of disability due to an accepted employment-related injury has the burden of proof to establish by the weight of the substantial, reliable, and probative evidence that the disability for which he or she claims compensation is causally related to the accepted injury. This burden of proof requires that a claimant furnish medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that, for each period of disability claimed, the disabling condition is causally related to the employment

---

<sup>7</sup> 20 C.F.R. § 10.5(x).

injury, and supports that conclusion with medical reasoning.<sup>8</sup> Where no such rationale is present, the medical evidence is of diminished probative value.<sup>9</sup>

OWCP's procedures provide that a recurrence of disability includes a work stoppage caused by a spontaneous material change in the medical condition demonstrated by objective findings. That change must result from a previous injury or occupational illness rather than an intervening injury or new exposure to factors causing the original illness. It does not include a condition that results from a new injury, even if it involves the same part of the body previously injured.<sup>10</sup>

### ANALYSIS

The Board finds that this case is not in posture for decision.

Preliminarily, the Board notes that it is unnecessary for it to consider the evidence appellant submitted prior to the issuance of OWCP's October 7, 2013 decision because the Board considered that evidence in its June 23, 2018 decision. Findings made in prior Board decisions are *res judicata* absent further review by OWCP under section 8128 of FECA.<sup>11</sup>

The relevant evidence appellant submitted in support of her recurrence claim consists of reports by Dr. Macht dated April 25, 2015 to October 25, 2019. In the April 25, 2015 report, Dr. Macht opined that appellant sustained a recurrence of disability due to her cervical condition and was currently disabled. In reports dated June 23, 2015, March 21, August 30, 2016, January 31, 2017, and October 15, 2019, he explained that appellant's cervical fusion surgery caused a worsening of her cervical spine condition and recurrence of disability beginning December 29, 2012. Dr. Macht explained that appellant's cervical fusion caused stress above and below the fusion site, which caused a progression of her degenerative disc disease above and below the fusion site. He also explained that if the progression of appellant's degenerative disc disease was due to aging, progression of degenerative disc disease would also be seen at other disc levels.

The Board finds that, while the reports from Dr. Macht are not fully rationalized, they are consistent in finding that the December 15, 2010 cervical fusion surgery resulted in an aggravation of her cervical condition and caused her to be disabled from work beginning December 29, 2012. Dr. Macht's opinion was also supported by the DMA's, Dr. Epstein's, April 7, 2020 report wherein he explained that appellant experienced adjacent level degeneration at the C5-6 level because the fused spinal segment transmitted amplified compressive and torsional forces to the adjacent mobile discs above and below, which multiplied the customary deterioration that occurred with aging. Although his reports were insufficient to meet appellant's burden of proof to establish the claim, they raised an uncontroverted inference between appellant's current condition and resultant inability to work and the accepted November 16, 2010 employment injury and authorized

---

<sup>8</sup> See *K.E.*, Docket No. 19-1922 (issued June 10, 2020); *J.S.*, Docket No. 19-1035 (issued January 24, 2020).

<sup>9</sup> *Id.*

<sup>10</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.2 (June 2013); *D.T.*, Docket No. 19-1064 (issued February 20, 2020).

<sup>11</sup> *M.D.*, Docket No. 20-0007 (issued May 13, 2020); *Clinton E. Anthony, Jr.*, 49 ECAB 476 (1998).

December 15, 2010 surgery, and thus, they are sufficient to require OWCP to further develop the medical evidence.<sup>12</sup>

It is well-established that proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter.<sup>13</sup> While the claimant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence and to see that justice is done.<sup>14</sup>

On remand, OWCP shall refer appellant to a physician in the appropriate field of medicine, along with the case record and a SOAF, for an examination and a rationalized medical opinion as to whether the accepted employment injury caused appellant's recurrence of disability as of December 29, 2012.<sup>15</sup> If the second opinion physician disagrees with Dr. Macht, he or she must provide a fully-rationalized explanation explaining why the accepted employment injury was insufficient to have caused the claimed recurrence of disability. After this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

### CONCLUSION

The Board finds that this case is not in posture for decision.

---

<sup>12</sup> *L.B.*, Docket No. 19-1621 (issued November 5, 2020); *Richard E. Simpson*, 55 ECAB 490, 500 (2004); *John J. Carlone*, 41 ECAB 354 (1989).

<sup>13</sup> *See L.B., id.*; *Vanessa Young*, 56 ECAB 575 (2004).

<sup>14</sup> *K.T.*, Docket No. 19-1436 (issued February 21, 2020); *Donald R. Gervasi*, 57 ECAB 281, 286 (2005); *Jimmy A. Hammons*, 51 ECAB 219 (1999); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

<sup>15</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3e (January 2013); *see also K.B.*, Docket No. 20-1001 (issued June 23, 2021).



**ORDER**

**IT IS HEREBY ORDERED THAT** the April 17, 2020 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: November 10, 2021  
Washington, DC

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board